STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Docket No. 225017

TAXPAYERS OF MICHIGAN AGAINST CASINOS, a Michigan non-profit corporation, and **LAURA BAIRD**, State Representative, Michigan House of Representatives, in her official capacity,

Plaintiffs/Appellants,

Supreme Court No. 129816

Court of Appeals No. 225017

v.

THE STATE OF MICHIGAN,

Defendant/Appellee,

Ingham County Circuit Court
No. 99-90195-CZ

and

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC. IV, a Florida corporation, and **GAMING ENTERTAINMENT (Michigan), LLC**, a Delaware limited liability company, **LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS**,

Intervening Defendants/Appellees.

BRIEF ON APPEAL – INTERVENING DEFENDANTS/APPELLEES LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS AND GAMING ENTERTAINMENT (MICHIGAN), LLC

ORAL ARGUMENT REQUESTED

THIS APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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STATEMENT OF THE BASIS OF JURISDICTION

Appellees Little Traverse Bay Bands of Odawa Indians ("LTBB") and Gaming Entertainment (Michigan), LLC ("GE") (together, the "Appellees" or "Intervenors") agree with Appellant Taxpayers of Michigan Against Casinos and Laura Baird (collectively, "TOMAC") that this Court has jurisdiction over this matter pursuant to MCR 7.301(A)(2), except to the extent that this Court finds that TOMAC lacks standing to make the arguments it raises in this appeal. To the extent that TOMAC's statement of the basis of jurisdiction discusses TOMAC's substantive arguments in this case, Appellees reject these statements, which will be addressed and rebutted in the Argument section of this brief.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. DOES TOMAC, A NOW-DISSOLVED CORPORATION, ITS MEMBERS, OR FORMER STATE REPRESENTATIVE LAURA BAIRD HAVE STANDING TO MAINTAIN A CLAIM THAT THE COMPACTS VIOLATE THE APPROPRIATIONS CLAUSE OF THE MICHIGAN CONSTITUTION?

The Court of Appeals did not address this question.

The Circuit Court did not address this question.

Plaintiff/Appellant Taxpayers of Michigan Against Casinos presumably would say: "Yes."

Defendant/Appellee State of Michigan presumably would say: "No."

Intervening Defendants/Appellees Little Traverse Bay Bands of Odawa Indians and Gaming Entertainment (Michigan), LLC say: "No."

II. DO THE 1998 COMPACTS, WHICH ARE CONTRACTUAL AGREEMENTS BETWEEN THE STATE OF MICHIGAN AND FOUR TRIBES, PROVIDE FOR AN APPROPRIATION OF MONEY OUT OF THE STATE TREASURY, IN VIOLATION OF THE APPROPRIATIONS CLAUSE OF THE MICHIGAN CONSTITUTION, CONST 1963, ART 9, § 17?

The Court of Appeals did not address this question.

The Circuit Court did not address this question.

Plaintiff/Appellant Taxpayers of Michigan Against Casinos says: "Yes."

Defendant/Appellee State of Michigan says: "No."

Intervening Defendants/Appellees Little Traverse Bay Bands of Odawa Indians and Gaming Entertainment (Michigan), LLC say: "No."

III. ARE THE COMPACTS COMPLETELY INVALID AND UNENFORCEABLE BECAUSE SECTION 17(C)(i) OF THE COMPACTS INDICATES THAT THE TRIBES SHALL MAKE PAYMENTS "TO THE MICHIGAN STRATEGIC FUND, OR ITS SUCCESSOR AS DETERMINED BY STATE LAW" OF 8% OF THE NET WIN DERIVED FROM CLASS III ELECTRONIC GAMES OF CHANCE?

The Court of Appeals did not address this question.

The Circuit Court did not address this question.

Plaintiff/Appellant Taxpayers of Michigan Against Casinos says: "Yes."

Defendant/Appellee State of Michigan says: "No."

Intervening Defendants/Appellees Little Traverse Bay Bands of Odawa Indians and Gaming Entertainment (Michigan), LLC say: "No."

INTRODUCTION

Intervening Defendants/Appellees LTBB and GE file this Appellees' Brief in opposition to TOMAC's brief regarding the Appropriations Clause issues TOMAC raised *for the first time in this litigation* on remand to the Court of Appeals. GE, a gaming consultant retained by the Nottawaseppi Huron Band of Potawatomi Indians, one of the four Tribes whose Compact has been challenged by TOMAC (the "Tribes"),[1] intervened as a party defendant in this case on September 20, 1999, shortly after TOMAC filed its complaint. On September 21, 2004, LTBB, another Tribe whose Compact is attacked by this litigation, filed a motion with the Court of Appeals to intervene as a party defendant so that it might address the amendment provision in the Compacts, the constitutionality of which was before the Court of Appeals on remand from this Court.[2] (Dkt. # 113).

In a brief filed with the Court of Appeals on remand, and for the first time in litigation that has persisted for nearly seven years, TOMAC argued that a portion of the language of Section 17 of the Compacts, as it relates to where the Tribes make certain payments, violates the Appropriations Clause of the Michigan Constitution. *See* Const 1963, art 9, § 17. TOMAC further alleged that Section 17 is not severable from the Compacts, and therefore that the original Compacts are invalid in their entirety. In response to a Motion to Strike filed by GE, the Court of Appeals entered an order striking these arguments from TOMAC's brief. (Dkt. #134; 143). TOMAC now has appealed that order to this Court, which granted leave to appeal on March 29, 2006. (Dkt. #165).

[1] These Tribes are the Little Traverse Bay Bands of Odawa Indians, the Little River Band of Ottawa Indians, the Pokagon Band of Potawatomi Indians, and the Nottawaseppi Huron Band of Potawatomi Indians.

[2] To date, only LTBB's Compact has been amended. LTBB thus has a particular interest in the validity of the amendment provision, the sole issue that remained after this Court's initial decision in this case.

In the interests of judicial economy and the preservation of resources, LTBB and GE here file a joint Appellees' Brief in response to TOMAC's appeal of the Court of Appeals' decision. Although LTBB and GE have no business relationship, their interests are closely aligned. (As is demonstrated by the brief being filed with this Court by the Amici Tribes, the interests of the other three Tribes whose Compacts are affected by this litigation also are so aligned.) TOMAC should not be permitted, at this late date, to assail the validity of the Compacts with novel theories that are both procedurally improper and substantively invalid.

TOMAC's claims regarding the validity of the Compacts have been defeated. In its decision of July 30, 2004, this Court definitively held that the Compacts are valid. *Taxpayers of Michigan Against Casinos v State of Michigan*, 471 Mich 306; 685 NW2d 221 (2004) ("*TOMAC*"). At this late stage in the case, TOMAC now attempts to challenge a portion of Section 17 of the Compacts as violative of the Appropriations Clause of the Michigan Constitution. *See* Const 1963, art 9, § 17. (TOMAC Brief at 9-11). TOMAC then attempts to argue that, if there is an Appropriations Clause issue with that limited language, the Compacts must fail in their entirety. (TOMAC Brief at 11-12). In essence, TOMAC brings a new challenge to five words in one section of the Compacts – "to the Michigan Strategic Fund" – and tries to stretch that challenge into a new claim that the Compacts as a whole are invalid. TOMAC does so even though all parties to the Compacts emphatically agree that precisely which subdivision of the State government receives revenue sharing payments from the Tribes has no bearing on the essence of the agreement between the parties. TOMAC cannot show that either of its primary propositions, or the daisy chain of logic it attempts to employ as their underpinnings, is correct. Accordingly, TOMAC's appeal is without merit and TOMAC's new claim should be rejected by this Court.

COUNTER-STATEMENT OF FACTS

Seven years ago, Plaintiff TOMAC initiated this suit in Ingham County Circuit Court, alleging that the gaming Compacts entered into in 1998 between the State of Michigan (the "State") and four federally recognized sovereign Indian tribes violated various provisions of the Michigan Constitution. (TOMAC App at 3a-26a). Primarily, TOMAC argued that the Compacts were invalid because the Legislature chose to approve them by concurrent resolution rather than by bill. The facts and procedural history of this case that are material to TOMAC's instant appeal are described herein.

I. STATEMENT OF MATERIAL FACTS

Soon after the four Tribes obtained federal recognition, then-Governor Engler, on behalf of the State of Michigan, negotiated Tribal-State compacts with the Tribes pursuant to the federal Indian Gaming Regulatory Act, 25 USC 2701 *et seq*. ("IGRA"). The Compacts were approved by the Michigan Legislature pursuant to House Concurrent Resolution 115 ("HCR 115"). (TOMAC App at 27a). Among other things, the Compacts set forth the contractual parameters under which the Tribes may conduct casino-style gaming on eligible Indian lands in the State of Michigan, including the types of games that may be offered, the manner of regulation of gaming, the manner and amount of Tribal payments to the State and local units of government, dispute resolution procedures, and other related items. (TOMAC App at 3a-26a).

Of particular relevance to this appeal, Section 17 of the Compacts provides for payments by the Tribes to the State, so long as the Tribes enjoy the exclusive right to operate commercial casino games and electronic games of chance within the State (excluding activities in the City of Detroit conducted pursuant to the Initiated Law of 1996 and activities undertaken by other federally recognized tribes pursuant to a valid Compact). (TOMAC App at 21a-22a). More

specifically, Section 17(C)(i) of the Compacts provides that the Tribes "will make semi-annual payments to the State as follows:"

> Payment to the Michigan Strategic Fund, or its successor as determined by State law, in an amount equal to eight percent (8%) of the net win at the casino derived from all Class III electronic games of chance, as those games are defined in this Compact. (TOMAC App at 21a).

Furthermore, Section 12(E) of the Compacts provides:

> In the event that any section or provision of this Compact is disapproved by the Secretary of the Interior of the United States or is held invalid by any court of competent jurisdiction, it is the intent of the parties that the remaining sections or provisions of this Compact, and any amendments thereto, shall continue in full force and effect. This severability provision does not apply to Sections 17 and 18 of this Compact. (TOMAC App at 18a).

After the Compacts were approved by the Secretary of the Interior, preparations by each of the Tribes began for the establishment of proposed gaming facilities. Two of the Tribes, LTBB and the Little River Band of Ottawa Indians, currently operate gaming facilities pursuant to the Compacts.[3]

[3] The other two Tribes have been stalled by litigation brought in federal court by TOMAC and other similar organizations. *Citizens Exposing Truth About Casinos v Norton*, No. 1:02CV01754-TPJ (DDC April 23, 2004) (discussing the plaintiff's challenge to the decision by the Bureau of Indian Affairs to take land into trust for the Nottawaseppi Huron Band of Potawatomi Indians, and noting that "CETAC's objective is to delay or, if possible, prevent the construction of the Tribe's proposed casino altogether"); *Taxpayers of Michigan Against Casinos v Norton*, 433 F3d 852 (CA DC, 2006) (rejecting TOMAC's challenge to the decision by the Bureau of Indian Affairs to take land into trust for the Pokagon Band of Potawatomi Indians). As is set forth in the Amicus brief of the Tribes, they nonetheless have continued to invest time and resources to pursue their rights under federal law and the Compacts.

II. STATEMENT OF MATERIAL PROCEDURAL HISTORY

On June 10, 1999, TOMAC filed this action against the State,[4] alleging that the Compacts were invalid because: (1) the Compacts were "legislation" and in approving them by resolution rather than by bill, the Legislature violated Const 1963, art 4, § 22; (2) the Compacts were "local acts," and in approving them by less than a two-thirds plurality and not submitting them to electors of the affected district (including TOMAC's members), the Legislature violated Const 1963, art 4, § 29; and (3) the Compact provision that authorizes the Governor to approve amendments on behalf of the State violates the separation of powers clause of the Michigan Constitution, Const 1963, art 3, § 2. The Defendants responded by arguing, *inter alia*, that the Compacts are contracts, and do not constitute legislation.

A. Decisions Of The Lower Courts

On January 18, 2000, the Ingham County Circuit Court issued its decision in this case, based upon cross-motions for summary disposition. (Dkt. #2). The trial court held that the Compacts constituted state legislation, and therefore found in favor of TOMAC on Count I (regarding the form of the Legislature's approval of the Compacts) and Count III (regarding the amendment provision and separation of powers). The Circuit Court rejected TOMAC's claim under Count II (regarding local acts).

All parties appealed those aspects of the trial court's decision unfavorable to them and, on November 12, 2002, the Court of Appeals issued its Opinion. In a unanimous decision, the

[4] TOMAC named only the State of Michigan as a defendant. Two of the consultants involved in the development of the proposed casinos, GE and North American Sports Management Company, Inc. ("NORAM") intervened as party defendants, pursuant to an order dated September 20, 1999. On August 12, 2002, at NORAM's request, the Court of Appeals dismissed NORAM as a party to this action. The Tribes were not originally made parties to this action. On September 20, 2004, after this Court's remand of the Compact amendment issue to the Court of Appeals, LTBB filed a Motion to Intervene with that court, citing the unique perspective and interest LTBB has in the specific and narrow issue presented on remand. The Court of Appeals granted LTBB's motion on October 8, 2004. (Dkt #121).

Court of Appeals reversed the trial court's decision, and found against TOMAC on all counts. (Dkt. #71). The Court of Appeals concluded that the Compacts are contracts, not legislation, and that the Legislature's concurrence in the Compacts by concurrent resolution was both governed by federal law and consistent with state law. The Court of Appeals also found TOMAC's "local acts" argument to be without merit. Finally, the Court of Appeals determined that TOMAC's separation of powers claim was not ripe for appellate review since, at that time, none of the Compacts had been amended.

B. Decision Of The Michigan Supreme Court

TOMAC filed an application for leave to appeal the Court of Appeals' decision to this Court and, after the Governor and LTBB entered into an amendment to LTBB's Compact (the "Amendment"), also sought leave to file a supplemental brief addressing the Amendment. On September 25, 2003, this Court granted TOMAC's application for leave to appeal, and also granted TOMAC's motion to file a supplemental brief. (Dkt. #84).

On July 30, 2004, this Court issued its decision in this case. *TOMAC*, *supra*. The lead opinion, authored by then-Chief Justice Corrigan, and joined by Justices Taylor and Young, found that the Compacts were valid, and that the Legislature's approval of the Compacts through HCR 115 did not constitute legislation. In a concurring opinion, Justices Kelly and Cavanaugh agreed.

A majority of this Court held that the Compacts are contracts between two sovereign entities – the Indian tribe and the State of Michigan – and were appropriately approved by resolution. *Id*. at 312. The Court also ruled that HCR 115 is not a "local act" in violation of Const 1963, art 4, § 29. *Id*. at 313. In reaching its conclusions, this Court expressly recognized that the State lacks the power to legislate over sovereign Indian tribes, and noted the unique context in which the compacting process took place, pursuant to the requirements of IGRA. *Id*.

at 319-323; *see also id*. at 336-343 (Kelly, J., concurring). The Court stated that Indian tribes are "distinct political communities" whose "sovereignty is limited only by Congress," and whose tribal immunity "is not subject to diminution by the States." *TOMAC*, *supra* at 319 (citations omitted).

The Court further ruled that the unique negotiation and compacting process between two sovereigns, the Tribe and the State, cannot be viewed as "legislation" by the State. As then-Chief Justice Corrigan explained:

> Here, the Legislature's approval of the compacts follows the assent of the parties governed by those compacts. Thus, the Legislature's role here requires mutual assent by the parties – a characteristic that is not only the hallmark of a contractual agreement but is also absolutely foreign to the concept of legislating. *TOMAC, supra* at 323-324 (emphasis added); *see also id*. at 347 (Kelly, J., concurring).

The Court further emphasized that the Compacts are not legislation because they do not regulate the people of the State of Michigan – those who are subject to the unilateral power of the Legislature – but only constitute the agreement of the Tribes to abide by certain restrictions on their activities. *TOMAC*, *supra* at 324.

After determining that the Compacts are not legislation, the Court next turned to the question of whether the Legislature was free to determine the means by which the State would bind itself to the Compacts. The Court began from the premise that the Michigan Legislature, unlike its federal counterpart, possesses plenary power, and its authority is restricted only by the limitations set forth in the state or federal constitutions. *Id*. at 327. Accordingly, the Court concluded that:

> It is acknowledged by all that our Constitution contains no limits on the Legislature's power to bind the state to a contract with a tribe; therefore, because nothing prohibits it from doing so, given the Legislature's residual power, we conclude that the Legislature

> has the discretion to approve the compacts by resolution. *Id*. at 328; *see also id*. at 347-348 (Kelly, J., concurring).

This Court thus rejected TOMAC's claims regarding the manner in which the Legislature approved the Compacts. In sum, then, the Court held that since the Compacts are not "legislation," and the Constitution does not dictate the manner of the Legislature's action when it performs tasks other than the passage of legislation, the Legislature is free to approve and bind the State to the Compacts and their terms by passage of a concurrent resolution. *Id*.

Because the LTBB Compact had been recently amended, and because the lower courts had not examined the Amendment, the Court remanded the sole question of whether Section 16 of the Compacts, which provides for an amendment procedure, violates the constitutional separation of powers doctrine. *Id*. at 333.

C. Actions By The Parties On Remand

In response to this Court's remand of the amendment issue and upon motion of the State, the Court of Appeals issued an Order, on October 8, 2004, authorizing all parties to this case to:

> [F]ile briefs addressing (1) whether the provision in the tribal-state gaming compact of the Little Traverse Bay Band of Odawa Indians, purporting to allow the governor to amend the compact without legislative approval, violates the separation of powers clause, Const 1963, art 3, § 2, (2) assuming that the amendment provision in the compact is constitutional, whether any aspect of the exercise of the power to amend violated the separation of powers clause, Const 1963, art 3, § 2, and (3) what effect will there be on the amendment as a whole if an aspect of the amendment violates the separation of powers clause. (Dkt. #121).

This Order was consistent with this Court's directive regarding the narrow issues on remand.

On November 5, 2004, TOMAC filed its Supplemental Brief with the Court of Appeals. (Dkt. # 129). Surprisingly, in Sections II.B and III of its brief, TOMAC addressed far more than the compact amendment clause or the Amendment itself, and argued that a portion of the language of Section 17 of the original Compacts violated the Appropriations and Separation of

Powers Clauses of the Michigan Constitution. *See* Const 1963, art 9, § 17; Const 1963, art 3, § 2. TOMAC further alleged that Section 17 is not severable from the Compacts, and therefore that the entire original Compacts are invalid.

On November 12, 2004, GE filed a Motion to Strike those sections of TOMAC's brief that went beyond the scope of the Court of Appeals' order on remand. (Dkt. #134). In its Motion, GE argued that TOMAC's Appropriations and Separation of Powers Clause arguments were outside of the scope of the remand order, and were barred by principles of *res judicata*. GE further argued that TOMAC should not be permitted to advance a new argument that it could have raised (but failed to raise) in its initial complaint, or at other stages of the case. The Court of Appeals granted this Motion on December 9, 2004. (Dkt. #143).

D. Decision Of The Court Of Appeals On Remand

On September 22, 2005, the Court of Appeals issued its decision on the remanded question regarding the amendment provision of the Compacts. (TOMAC App at 156a-168a). Judge Schuette authored the majority opinion, which was joined by Judge Owens. Judge Borrello filed a dissenting opinion. The majority found that Section 16 of the Compacts, the amendment provision, violates the Separation of Powers Clause in Const 1963, art 3, § 2. (TOMAC App at 157a). Consistent with its Order granting GE's Motion to Strike, the Court of Appeals "decline[d] to address plaintiffs' additional arguments" regarding the Appropriations Clause. (TOMAC App at 164a).

E. Parties' Actions After Remand

In response to the Court of Appeals' decision on remand, the State, LTBB, and TOMAC all filed Applications for Leave to Appeal with this Court. (Dkt. #151-153). While the State's and LTBB's Applications sought leave to appeal the Court of Appeals' erroneous holding regarding the amendment provision in the Compacts, TOMAC's Application again sought to

assert its new argument that language in Section 17 of the Compacts violates the Appropriations Clause of the Michigan Constitution.[5] This Court granted all three Applications on March 29, 2006. (Dkt. #165-167). This brief responds to the arguments TOMAC advanced in its substantive brief, filed on May 24, 2006.

SUMMARY OF ARGUMENT

While this case was on remand to the Court of Appeals for consideration of the amendment provision in the Compacts, TOMAC asserted for the first time that the Compacts are invalid based on the Appropriations Clause of the Michigan Constitution, Const 1963, art 9, § 17, and MCL 18.1441(1). Since TOMAC asserts this new argument for the first time at this late stage in this case, it is appropriate to reexamine TOMAC's standing to bring the claim. Upon reexamination, it is clear that neither TOMAC itself nor Plaintiff Laura Baird possesses such standing. First, TOMAC has not demonstrated an injury in fact that is concrete and particularized and actual or imminent. Second, Laura Baird not only no longer serves in Michigan's House of Representatives, but also cannot show that she alone possessed the vote necessary to defeat the Compacts.

Even assuming that TOMAC and Ms. Baird have standing to bring this claim, however, their arguments still must fail. The Compacts do not violate the Appropriations Clause because they do not direct that funds be paid out of the State Treasury. Instead, the Compacts direct the Tribes to pay money into the Michigan Strategic Fund ("MSF"). The MSF is a public body corporate and politic created by the Michigan Legislature. As a "quasi-corporation," the MSF operates to accomplish a public purpose, and has the power to receive and spend public funds. The MSF does not, however, hold state funds. The MSF is a public entity distinct from the State

[5] Although TOMAC did not style its brief as such, it appears that the real issue here is whether the Court of Appeals acted properly in granting GE's Motion to Strike.

and its funds are not funds of the State. Accordingly, MCL 18.1441(1), which requires that state funds shall be deposited pursuant to directives of the State Treasurer, does not apply to the MSF. Funds received by the MSF are not receipts of state government, and the MSF is authorized by separate statute to receive funds for its own purposes.

Finally, even if this Court were to find some constitutional or statutory infirmity in the Compacts' direction of tribal payments to the MSF, TOMAC still cannot obtain the relief that it seeks. Instead, given the opportunity, this Court must interpret the Compacts in a manner that renders them valid. Regardless of the requirements that state law or the Constitution might impose on the State in the way that it deals with the funds, the agreement between the State and the Tribes is constitutionally unassailable. Further, if the Court finds that the language in the Compacts directing the tribal payments to the MSF itself is improper, this Court should sever that language so as to preserve the Compacts and effectuate the intention of the parties.

STANDARD OF REVIEW

As is set forth below and in the Amicus brief of the Tribes, TOMAC's new constitutional arguments are barred for numerous reasons. Although TOMAC does not frame its argument in this manner, TOMAC here seeks review of the Court of Appeals' procedural decision to grant GE's Motion to Strike. This Court must review that decision for an abuse of discretion. *Brown v Hayes*, 270 Mich App 491; ___ NW2d ___ (2006); *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003) (noting that a court's decision to grant a motion to strike is reviewed for an abuse of discretion). Under this standard of review, the Court may reverse the Court of Appeals' decision only if it finds that an unprejudiced person considering the facts on which the Court of Appeals acted would say that there was no justification or excuse for the ruling made. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761-762; 685 NW2d 391 (2004). To the extent that this Court finds that TOMAC presents a substantive constitutional issue apart

from the procedural question of whether the Court of Appeals properly granted GE's Motion to Strike, this Court should review that issue *de novo*. *County Road Ass'n of Mich v Governor*, 474 Mich 11, 14; 705 NW2d 680 (2005). Furthermore, whether a party has standing to bring an appeal is a question of law that is reviewed *de novo*. *Lee v Macomb Co Bd of Commr's*, 464 Mich 726, 734; 629 NW2d 900 (2001). This Court must defer to the Legislature, however, if it finds that the Legislature has acted pursuant to its plenary powers and within the scope of its constitutional authority. *See TOMAC*, *supra* at 329; *LeRoux v Secretary of State*, 465 Mich 594, 619; 640 NW2d 849 (2002); *Kull v Mich State Apple Comm*, 296 Mich 262, 267; 296 NW 250 (1941); *Malisjewski v Geerlings*, 57 Mich App 492, 495; 226 NW2d 534 (1975). The burden of proving that the Legislature has acted unconstitutionally rests with TOMAC, as the Legislature generally is presumed to act within the scope of its powers. *Doyle v Election Comm of Detroit*, 261 Mich 546, 549; 246 NW 220 (1933); *Morris v Metriyakool*, 107 Mich App 110, 116-117; 309 NW2d 910 (1981).

ARGUMENT

I. TOMAC LACKS STANDING TO CHALLENGE THE COMPACTS UNDER THE APPROPRIATIONS CLAUSE OR MCL 18.1441(1).

While this case was on remand to the Court of Appeals, TOMAC raised, *for the first time in this litigation*, the issue of whether Section 17(C)(i) of the Compacts violates the Appropriations Clause of the Michigan Constitution and MCL 18.1441(1).[6] This came after this

[6] Although TOMAC asserts that the appropriations issue first arose only after this Court issued its decision holding that the Compacts are contracts, the Court of Appeals also had concluded that the Compacts are contracts in its decision issued on November 12, 2002. (TOMAC Brief at 6). (Dkt. #71). Furthermore, the State and Intervenors have argued from the initial stages of this case that the Compacts are contracts and should be viewed by the courts as such, and not as legislation. Nevertheless, in an attempt to further prolong this litigation, TOMAC filed an Application for Leave to Appeal with this Court, arguing that the Compacts violate the Appropriations Clause based on a strained interpretation of case law from this Court and the Court of Appeals. In response, LTBB and GE have asserted, and both LTBB and GE continue to believe, that TOMAC's arguments are barred by principles of *res judicata* and the

Court already had ruled that the Compacts do not violate the provisions of the Michigan Constitution related to passing legislation by bill, Const 1963, art 4, § 22, or passing local acts, Const 1963, art 4, § 29. The sole issues remaining in this case relate to the amendment provision in the Compacts, which is the subject of a separate appeal, and TOMAC's new Appropriations Clause arguments. Given that TOMAC has raised the Appropriations Clause arguments for the first time at this stage in the litigation, it is appropriate to return to basic principles and to first determine whether TOMAC has standing to raise these new claims.

A. Intervenors May Assert A Standing Challenge In This Court.

At its core, standing addresses subject matter jurisdiction, which involves the power of a court to hear and determine a cause or matter. *Detroit Firefighters Assoc v Detroit*, 449 Mich 629, 633, n 3; 537 NW2d 436 (1995) *reh'g denied*, 450 Mich 1215; 543 NW2d 309 (1995) (noting that "[s]tanding is a jurisdictional issue"). Consequently, standing issues may be raised at any time by the parties, or *sua sponte* by the court. *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 630; 684 NW2d 800 (2004) ("Subject-matter jurisdiction is a matter that may be raised at any time."). A party may raise the issue of standing, therefore, for the first time on appeal. *See Bender v Williamsport Area Sch Dist*, 475 US 534, 546-47; 106 S Ct 1326 (1986). Furthermore, a plaintiff must maintain standing throughout all stages of litigation. *City Communications Inc v Detroit*, 888 F2d 1081, 1086 (CA 6, 1989).

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law of the case doctrine. *See* Responses to TOMAC's Leave Application, Dkt. #157, 158; *see also* Brief of Amici Tribes filed as of the date of this brief. While TOMAC asserts that these procedural arguments are moot now that this Court has granted its Application for Leave to Appeal, it bases this assertion only on *Huey v Campbell, Wyant & Cannon Foundry*, 55 Mich App 227; 222 NW2d 191 (1974). In that case, however, the issue raised by plaintiff on appeal was "raised by the appeal board itself and addressed fully in several of the members' opinions." *Id*. at 230. This is not the case here, as this Court did not address the Appropriations Clause at all in its decision in this case, nor did the Court of Appeals. *TOMAC, supra*. Consequently, this Court should use this opportunity to reaffirm the principles of *res judicata* and law of the case and uphold the Court of Appeals' decision on this matter, rather than sanctioning an approach to litigation that gives plaintiffs repeated "bites at the apple."

Although Michigan courts are not "Article III Courts," the standing doctrine in Michigan has developed on a similar track as the federal standing doctrine. *Lee*, *supra* at 737. In fact, this Court in 2001 adopted the same test that is used by federal courts for determining whether a plaintiff has standing. *Id*. at 739. Three years later, a majority of this Court re-affirmed that adoption, and articulated the standing test under Michigan law:

> At a minimum, standing consists of three elements: "First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."' Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly…traceable to the challenged action of the defendant, and not…the result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision."' *Cleveland Cliffs*, *supra* at 628-29 (citations omitted).

This standing test, which is based on the United States Supreme Court's holding in *Lujan v Defenders of Wildlife*, 504 US 555, 560-61; 112 S Ct 2130 (1992), is not a new development in Michigan law. Rather, it represents a re-affirmation of the Michigan Constitution's allocation of authority between the three branches of government. *See Lee*, *supra* at 735-39; *Cleveland Cliffs*, *supra* at 612-629. At bottom, it reflects a core understanding that "there is no liberty … if the power of judging be not separated from the legislative and executive powers." *Cleveland Cliffs*, *supra* at 613, quoting Madison, *The Federalist No 47*.

According to this Court, therefore, separation of powers principles require Michigan courts to be cautious not to usurp the powers of the other two political branches. The standing doctrine assists the court in maintaining this separation. Without a careful regard to standing:

> the result would be to have the judicial branch of government—the least politically accountable of the branches—deciding public policy, not in response to a real dispute in which a plaintiff had suffered a distinct and personal harm, but in response to a lawsuit

> from a citizen who had simply not prevailed in the representative processes of government. *Cleveland Cliffs*, *supra* at 615.

In other words, disregarding the standing doctrine expands the judicial power and provides another forum for individuals who have been unsuccessful in the representative branches of the government. *Id*. at 616. Such a result greatly misconstrues the power and purpose of the judiciary—a body that is supposed to "decide private disputes between or concerning persons," not "regulate public concerns, and…make law for the benefit and welfare of the state." *Id*. at 614, quoting Cooley, *A Treatise on the Constitutional Limitations*, at 92 (Little, Brown & Co., 1886).

B. Application Of Michigan's Standing Test Reveals That TOMAC Lacks Standing To Sue.

In its Complaint, TOMAC alleges that it is a non-profit corporation,[7] located in New Buffalo, Michigan, which opposes the proliferation of Indian casinos. (Complaint at ¶¶ 13-14; **App at 23b**). A non-profit organization, however, only has standing to bring a suit in the interest of its members if the members themselves would have standing as individual plaintiffs. *Cleveland Cliffs*, *supra* at 629. Accordingly, TOMAC only has standing if individual members of the organization can meet Michigan's standing requirements.[8] *Id*.

[7] While TOMAC was a Michigan corporation in good standing when it filed its complaint in 1999, TOMAC since has been automatically dissolved for failure to file its annual statements. **(App at 68b).** *See* MCL 450.2922 (stating that if a corporation fails to file an annual report for two consecutive years, the corporation is automatically dissolved as a matter of law). Since TOMAC last completed an annual report for 2002, TOMAC was automatically dissolved as of October 1, 2005. **(App at 68b).** The Nonprofit Corporation Act, 1982 PA 162, MCL 450.2101 to 450.3192, empowers legally formed nonprofit corporations to "[s]ue and be sued in all courts and participate in actions and proceedings judicial, administrative, arbitrative or otherwise, in like cases as natural persons." MCL 450.2261. TOMAC no longer holds this power as a corporation, however, because it has lost its corporate status.

[8] As a nonprofit corporation, TOMAC could have alleged standing under the Revised Judicature Act, which provides:

> [A]n action to prevent the illegal expenditure of state funds or to test the constitutionality of a statute relating thereto may be

TOMAC, however, makes no allegation that demonstrates that any of its individual members have suffered an injury in fact. An injury in fact requires "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.'" *Cleveland Cliffs*, *supra* at 628-29. A "particularized" injury requires a "demonstration that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large." *Dodak v State Admin Bd*, 441 Mich 547, 554; 495 NW2d 539 (1993). Furthermore, in order to establish that the injury is "actual or imminent," a plaintiff must include "general factual allegations that injury will result from the defendant's conduct." *Cleveland Cliffs*, *supra* at 631.

In its original complaint, TOMAC alleged that individual members Russell Bulin and Michael Hosinski were "deprived of [their] right to vote to approve or disapprove the Gambling

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> brought in the name of a domestic nonprofit corporation organized for civic, protective, or improvement purposes, or in the names of at least 5 residents of this state who own property assessed for direct taxation by the county wherein they reside. MCL 600.2041(3).

As is explained above, TOMAC no longer is a nonprofit corporation. Since TOMAC has lost its corporate status, it cannot claim to have standing under MCL 600.2041(3). Since TOMAC names only two individual members in its complaint, TOMAC also cannot meet the 5 resident threshold of the second clause of that statute. Any claims of standing under MCL 600.2041, therefore, are unfounded. Furthermore, putting aside the issue of whether the funds paid by the Tribes to the MSF constitute "state funds" (which Part II.A.2. of this brief will show they are not), this statute alone cannot grant standing to an organization that cannot meet the constitutional standards of injury, causation, and redressability that this Court adopted in *Lee* and *Cleveland Cliffs*. Allowing the Legislature to statutorily grant standing to any "nonprofit corporation organized for civic, protective, or improvement purposes" would eradicate those standards, and would allow Michigan courts to hear cases in which there is no real dispute. Such a standard would assail the separation of powers notions that the standing doctrine is meant to protect. Indeed, as this Court recently recognized, allowing the Legislature to grant standing to parties that do not meet the constitutional requirements of standing "would exceed the Legislature's authority because, except where expressly provided, this Court is not constitutionally authorized to hear nonjusticiable controversies." *Federated Ins Co v Oakland County Rd Comm*, ___ Mich ___; ___ NW2d ___ (2006); *see also Sharp v Lansing*, 464 Mich 792, 810; 629 NW2d 873 (2001).

Compacts, as required by Article IV, Section 29, of Michigan's Constitution concerning local acts." (Complaint at ¶¶ 15-16; **App at 23b-25b**). TOMAC's claims related to Article 4 Section 29 of the Michigan Constitution, however, have been rejected by this Court. In *TOMAC*, this Court held that "tribal-state compacts are not 'local acts.' … Accordingly, we affirm the decision of the Court of Appeals that the compacts do not violate Const 1963, art 4, § 29… ." *TOMAC*, *supra* at 335 (emphasis added). Accordingly, standing can no longer be grounded in TOMAC's claims regarding the local acts provision of the Constitution. Const 1963, art 4, § 29.

Without the specific and particularized injury related to Article 4, Section 29, TOMAC is left only with conjectural assertions lacking specificity. The complaint alleges that the Compacts injure both Bulin and Hosinski "in a way that is different from the citizenry at large" because they "believe" that they will be:

> exposed to, and injured by, the negative effects of casino gambling which include: a) increased crime; b) the diversion of police and judicial resources away from other activities; c) decreased property values; d) the loss of the use of other businesses, such as retail stores and restaurants, forced out by the casino; e) the loss of consumer money to be spent at [the plaintiffs'] business; f) increased bankruptcies in the community; g) the diversion of community resources to the treatment of gambling addicts; h) the weakening of the moral and family atmosphere in the community; i) the diversion of community resources to the construction and maintenance of infrastructure for the casino; and j) the overall weakening of the area's economy. (Complaint, ¶¶ 15-16; **App at 23b-25b**).

None of the above allegations are either particularized or imminent, however, nor do they relate in any way to TOMAC's latest argument – that directing funds to the MSF in a Compact, rather than into the State Treasury for appropriation, violates the Michigan Constitution.

First, TOMAC fails to describe how Bulin and Hosinski would suffer an injury different from the citizenry at large.[9] In *Firefighters*, the Supreme Court considered a mandamus action brought by members of the Detroit Firefighters Association who sought to compel the Mayor of Detroit to expend monies appropriated by the Detroit City Council for a new fire department squad. The plaintiffs alleged an "increased risk of injury, emotional distress, and loss of morale and efficiency as a direct result of" the executive branch of the city impounding the money. *Firefighters*, *supra* at 635. The Court found that the claimed harm was no different from the harm suffered by the general public, and held that the Firefighters Association did not have standing. *Id*. at 638. TOMAC's broad-based and vague assertions, even if assumed to be true, are far less particularized than the claims made in *Firefighters*. There is absolutely no indication that Bulin and Hosinski will suffer a harm different from any other individual in the community. In fact, the allegations themselves involve injuries suffered by the community as a whole, not by Bulin and Hosinski themselves. For this reason, TOMAC lacks standing, and this Court does not have jurisdiction to hear TOMAC's claims.

Furthermore, demonstrating standing for individuals challenging an illegal expenditure requires certain specific allegations. An individual only has a right to sue a unit of government for an illegal expenditure of funds if he alleges "that he will sustain substantial injury or suffer loss or damage as a taxpayer, through increased taxation and the consequences thereof." *Westen v City of Allen Park*, 37 Mich App 121, 123; 194 NW2d 542 (1972). In other words, an

[9] Upon information and belief, Appellees understand that it is now impossible for TOMAC to demonstrate that Mr. Hosinski will suffer any injury cognizable in a Michigan court. Mr. Hosinski apparently has moved to Indiana, is no longer a Michigan resident, and no longer owns or operates a retail business in New Buffalo. This would make it impossible for Mr. Hosinski to prove the injuries stated in the complaint or to assert standing under MCL 600.2041(3), discussed *supra*. As an Indiana resident and non-taxpayer in Michigan, Mr. Hosinski has absolutely no legal interest in this litigation.

individual must show that the challenged expenditure somehow will cause him to suffer a financial harm related to the taxation. This TOMAC has not even alleged and cannot show.

TOMAC also cannot establish an "actual or imminent injury." *Cleveland Cliffs* requires evidence of an actual injury to establish standing—"general factual allegations that injury will result from the defendant's conduct." *Cleveland Cliffs*, *supra* at 631. That case involved a dispute regarding the environmental impacts of a proposed mine. In order to show that its members had standing, the plaintiff non-profit organization in *Cleveland Cliffs* provided affidavits from three of its members "who reside near the mine, who alleged they bird-watched, canoed, bicycled, hiked, skied, fished and farmed in the area," and were concerned that "the mine expansion will irreparably harm their recreational and aesthetic enjoyment of the area." *Id*. at 631. Later, the allegations were bolstered by expert testimony that the proposed mine would affect water quality and wildlife, thereby providing the necessary "factual support for the individuals' averred injuries." *Id*. at 631.

In contrast to *Cleveland Cliffs*, TOMAC fails to offer any real evidence or expert witness testimony to support that it has standing. In fact, TOMAC fails even to make factual allegations. Instead, TOMAC fills its complaint with tenuous contentions that Bulin and Hosinski will somehow suffer harm if a casino is built in their community. These hypothetical injuries, such as the "overall weakening of the area's economy," and "the weakening of the moral and family atmosphere in the community," contain no factual allegations. They are merely conjectural statements illustrating TOMAC's moral and personal opposition to casinos in general. TOMAC's assertions fail to demonstrate an "actual or imminent" harm, and fall far short of satisfying Michigan's constitutional standing requirement.

Furthermore, assuming *arguendo* that TOMAC's claims are valid and that the tribal payments somehow have been "mis-appropriated" (which they have not), TOMAC still fails to demonstrate that its members have suffered an actual injury due to this alleged misappropriation. Neither TOMAC's brief, nor its complaint, illustrates how an individual member of TOMAC has an interest in the allegedly "misappropriated" monies. There is no allegation that TOMAC's members will "suffer loss or damage…through increased taxation." *Westen, supra* at 123.

In addition, there is no proof that the claimed "misappropriation" harms anyone, let alone harms TOMAC's members in a specific manner different from the citizenry at large. Without claiming an injury different from that of the citizenry at large, TOMAC cannot raise an Appropriations Clause claim in this appeal. This Court, therefore, lacks subject matter jurisdiction to hear TOMAC's claim.

In summary, all injuries alleged by TOMAC are generalized harms that would affect TOMAC and its members in the same way that they would affect the citizenry at large. Furthermore, TOMAC's allegations themselves are nothing more than unsupported conjectural assertions having no basis in fact. When this Court held that the Compacts do not violate the local acts clause of the Michigan Constitution, TOMAC lost standing to assert any other claims. Accordingly, this Court lacks subject matter jurisdiction, and it should dismiss TOMAC's claims.

C. Laura Baird Lacks Standing To Challenge The Compacts Generally, And To Make The Appropriations Clause Claim In Particular.

In addition to TOMAC, Laura Baird, a <u>former</u> state representative who voted against approving the Compacts, remains a party to this litigation. Ms. Baird, however, is now a sitting judge and is not a member of the Michigan Legislature, and she has not actively participated in the case for several years. Similar to TOMAC, Ms. Baird makes only speculative and general

claims in the complaint that fall far short of the requirements for standing. Furthermore, the Plaintiffs' new arguments regarding the language of Section 17(C)(i) of the Compacts come five years after Ms. Baird left the Michigan Legislature. Consequently, this Court should find that Ms. Baird lacks standing in this matter.[10]

1. *A Legislator Must Overcome A Heavy Burden In Order To Establish Standing As An Elected Official.*

Laura Baird makes no allegation explaining how she has suffered an injury in fact. Instead, Ms. Baird claims to have suffered injuries in her capacity as "a legislator and member of the majority of elected State Representatives that did not vote to approve the Compacts… ." (Complaint ¶ 18; **App at 25b**). This implies that, as a legislator, Ms. Baird has a special right to standing due to her status as an elected official. This is not the case. In order to establish standing as a legislator, an individual "must overcome a heavy burden." *Dodak v State Admin Bd*, 441 Mich 547, 555; 495 NW2d 539 (1993). This is especially true when the elected official asks the Court to hear a dispute that may interfere with the powers and duties of separate branches of government. *Id.*; *see also Raines v Byrd*, 521 US 811; 117 S Ct 2312 (1997). As a result, Ms. Baird must assert "more than a generalized grievance that the law is not being followed." *Dodak, supra* at 556, quoting *Dennis v Luis*, 741 F2d 628 (CA 3, 1984). Instead, she must show either that her vote was not given full effect or that her vote, together with those of other legislator parties to the case, would have been enough to have defeated the Compacts. *Baird v Norton*, 266 F3d 408, 412 (CA 6, 2001).

[10] Intervenors asserted that Ms. Baird did not have standing at the trial court level. Because the trial court found that TOMAC had standing, it failed to address Ms. Baird's standing. (Trial Court Opinion at 13; TOMAC App at 43a). As already discussed, TOMAC no longer has standing to bring its claims. Therefore, it is appropriate for this Court to consider whether Ms. Baird has standing. It is readily apparent that she does not.

2. *Baird's Claims Do Not Meet The Heavy Burden Placed On Legislators.*

In *Dodak*, legislators challenged the authority of the State Administrative Board to transfer appropriated funds within a department. The legislators claimed standing as individual members of the Legislature, and claimed that the transfers "reduced their effectiveness as legislators and nullified the effect of their votes." *Dodak, supra* at 554-55. The Supreme Court dismissed all legislators but the chair of the House Appropriations Committee, reasoning that the legislators did not assert a particularized and imminent injury as a result of the State Administrative Board's actions.[11] *Id.* at 560-61. Instead, the Court noted, the legislators merely asserted that the law was not being followed. *Id*. Such an assertion was nothing more than "suing to reverse the outcome of a [lost] political battle." *Id.* at 561.

Like the elected-official plaintiffs in *Dodak*, Ms. Baird fails to show how she has suffered an injury as a legislator. In the complaint, Ms. Baird alleges that she has standing because "her position would have carried the day but for the unconstitutional procedures used to purportedly approve the Compacts." (Complaint, ¶ 18; **App at 25b**). This assertion is entirely speculative, as no one can predict what would have happened had the Compacts been presented to the Legislature in the form of legislation, or what political realities would have affected the voting on such legislation.

Although most of the allegations in TOMAC's original complaint have been disposed of by this Court,[12] even if this Court considers Ms. Baird's claims as they relate to the

[11] The committee chairman, Rep. Jacobetti, had standing because he had a statutory right to approve or disapprove certain transfers. This meant that he had a particularized injury. *Dodak, supra* at 560-61.

[12] Ms. Baird's assertions contained in paragraph 19 of the complaint allege that she was deprived of several constitutional rights due her as a member of the House. (Complaint, ¶ 19; **App at 26b**). These allegations were rendered moot by this Court's decision in *TOMAC*. As already discussed, in *TOMAC*, this Court held that "tribal-state compacts are not 'local acts.'"

Appropriations Clause claim, her allegations fail to meet the requirements of Michigan's standing doctrine for legislators because she fails to allege, and cannot show, an individual injury as a legislator. Although Ms. Baird claims that her right to participate in a process mandated by Michigan's Constitution was precluded because the procedures for passing a bill were not followed, these assertions alone cannot confer standing. *Baird v Norton*, 266 F3d 408, 411 (CA 6, 2001) (noting that an allegation of a denial of procedural safeguards for passage of legislation is a "generalized grievance shared by all Michigan residents alike," and thus does not give legislators standing to sue).

In fact, in *Baird*, the United States Court of Appeals for the Sixth Circuit found that Ms. Baird had no standing to challenge the Secretary of the Interior's approval of the very Compacts at issue in this case. *Id*. That court found that "[f]or legislators to have standing as legislators, they must possess votes sufficient to have either defeated or approved the measure at issue." *Id*. at 412. The Court of Appeals thus held:

> In the present case, … the only member of the Michigan House of Representatives seeking relief is Baird. Baird claims vote nullification, but her vote alone would not have been sufficient to defeat either the concurrent resolution, which passed despite her "nay" vote, or legislation to similar effect. The Michigan Constitution may require a majority of all members' votes for legislation to be approved, but it does not require unanimity. Thus, although Baird's institutional power was diluted through the use of the continuing resolution procedure, she has not suffered an injury that satisfies the stringent requirements for legislator standing…. *Id*.

Ms. Baird's claims amount to nothing more than a failure to prevail in the political process. This Court does not have subject matter jurisdiction over complaints seeking to reverse

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TOMAC, *supra* at 335. Likewise, this Court concluded that the compacts were appropriately approved through resolution. *Id*. at 347. For those reasons, all of Ms. Baird's claims contained in paragraph 19 of the complaint are moot.

the outcome of a lost political battle. "It would be imprudent and violative of the doctrine of separation of powers to confer standing on a legislator simply for failing in the political process." *Dodak, supra* at 556. Ms. Baird does not meet the heavy burden for establishing standing as a legislator.

Since neither TOMAC nor Laura Baird have standing to assert the new arguments advanced in TOMAC's Application for Leave to Appeal, this Court should dismiss that appeal.

II. THE COMPACTS DO NOT CONSTITUTE AN APPROPRIATION OF MONEY OUT OF THE STATE TREASURY, AND THEREFORE DO NOT VIOLATE THE APPROPRIATIONS CLAUSE.

Even if this Court finds that TOMAC and Laura Baird have standing, however, TOMAC's arguments still fail on the merits. In fact, the very questions TOMAC presents to this Court, even if answered in the manner TOMAC suggests, do not lead to the result TOMAC seeks. In its Brief to this Court, TOMAC's first question presented is: "Did this Court's decision in [*TOMAC*] have the effect of overruling *Tiger Stadium Fan Club Inc v Governor*, 217 Mich App 439; 553 NW2d 7 (1996)?" (TOMAC Brief at vi). The answer to this question, however, has no effect on the validity of the Compacts.

In its Brief, TOMAC crafts a tortured tautology that strains this Court's holdings in *TOMAC* and misapplies the Court of Appeals' decision in *Tiger Stadium Fan Club Inc v Governor*, 217 Mich App 439; 553 NW2d 7 (1996), *lv den* 453 Mich 866 (1996). TOMAC's argument can be summarized in the following steps:

1. In *Tiger Stadium*, the Court of Appeals found that the payments from the 1993 Compacts are "gratuitous" and the State "gave up nothing" in exchange for them, and therefore the payments are not state funds subject to appropriation.
2. In *TOMAC*, this Court found that the Compacts are actually contracts.

3. Contracts require consideration or, put another way, that the parties "give up something" in exchange for something else.

4. If payments to the State or a state-created entity that are gratuitous and not in exchange for something else are *not* state funds subject to appropriation, then payments which are not gratuitous but instead are made pursuant to a contract with the State providing something in return *are* "state funds" subject to appropriation.

5. The revenue sharing payments thus are state funds.

6. Because the revenue sharing payments are state funds, they must be deposited in the Treasury pursuant to MCL 18.1441(1).

7. Because they must be deposited in the State Treasury, the Appropriations Clause provides that the funds cannot be expended without being appropriated pursuant to law.

8. Depositing the payments in the MSF is an appropriation and, if done without a statute, violates the Appropriations Clause.

9. The payment provision directing the payments to the MSF was approved by resolution, not enacted by statute, and therefore it violates the Appropriations Clause.

10. The payment provision, which violates the Appropriations Clause, is not severable, so the entire Compacts fail.

TOMAC's reasoning is fatally flawed. The essential element of their chain of argument, set forth in point 4 above, is a logical fallacy. According to TOMAC, the Court of Appeals in *Tiger Stadium* ruled that "if the payments are gratuitous, then they are not state funds." TOMAC in

point 4 would say that this therefore means that "if the payments are not gratuitous, then they are state funds." TOMAC's assertion is incorrect as a matter of law. As is explained below, the fact that a payment is made in exchange for something does not necessarily make those funds state funds subject to appropriation.

In addition to the fact that the logic of TOMAC's argument utterly fails, in presenting its first question to this Court and making its arguments, TOMAC also fails to recognize that neither the reasoning nor the result in *Tiger Stadium* establishes the analytical framework for this case. *Tiger Stadium* is a decision by the Court of Appeals, not this Court, that deals with a payment provision contained in a consent decree entered into by the Governor and several other tribes in 1993, and that resulted in compacts approved by a resolution of the Legislature. The holdings and reasoning of that decision do not bind this Court. Instead of attempting to retrofit this case to the analytical framework of *Tiger Stadium*, this Court undoubtedly will engage in its own analysis of the appropriations issues presented by TOMAC.

TOMAC's second question presented for review in this case is: "Does the Michigan Legislature have the power to appropriate state funds by resolution, rather than a legislative enactment?" (TOMAC Brief at vi). While the Appropriations Clause provides that "[n]o money shall be paid out of the state treasury except in pursuance of appropriations made by law," Const 1963, art 9, § 17, TOMAC has not demonstrated and cannot demonstrate that the Compacts (or the resolution approving them) direct money to be paid out of the State Treasury or are otherwise invalid as a matter of Michigan constitutional law.[13]

[13] It is unclear from TOMAC's argument whether it asserts either that (a) there is an Appropriations Clause violation because the language in the Compacts that directs the tribal payments to the Michigan Strategic Fund constitutes an appropriation in and of itself, or (b) the MSF cannot spend the money it receives without an appropriation. In either case, however, TOMAC's arguments do not withstand scrutiny.

A. The Compacts Do Not Violate The Appropriations Clause.

As is stated above, the Appropriations Clause of the Michigan Constitution provides: "No money shall be paid out of the state treasury except in pursuance of appropriations made by law." Const 1963, art 9, § 17. The Compacts do not result in a payment of funds out of the state treasury, and thus do not constitute an appropriation.

1. *No Money Has Been Paid Out Of The State Treasury.*

Section 17(C)(i) of the Compacts provides that the Tribes will make semi-annual payments "to the Michigan Strategic Fund, or its successor as determined by State law." (TOMAC App at 21a). In other words, the Compacts embody an agreement that the Tribes will, under certain conditions, make payments to the Michigan Strategic Fund ("MSF"). An examination of the plain language of the Appropriations Clause, however, reveals that it applies only to payments "out of the state treasury." Const 1963, art 9, § 17 (emphasis added). Given its plain language, the Appropriations Clause does not apply to payments made by the Tribes pursuant to Section 17 of the Compacts.

First, the payments made pursuant to Section 17(C)(i) are payments out of the net win of the Tribes, not payments out of the State Treasury. The payment of funds by the Tribes to the MSF cannot constitute an appropriation, as the Legislature has control only over payments out of the State Treasury, not payments out of tribal funds made pursuant to the Tribes' contractual agreements. As TOMAC recognizes in its Brief, the Legislature controls "the purse strings of government, including how to raise and spend State funds."[14] (TOMAC Brief at 10). The Legislature does not control the purse strings of the Tribes, which are sovereign governments. *TOMAC, supra* at 319.

[14] As is demonstrated in Part II.A.2., below, the funds paid by the Tribes to the MSF are not "state funds."

Second, when the Tribes make payments pursuant to Section 17(C)(i), the payments flow into the Michigan Strategic Fund. The Compacts do not speak to how those funds are to be expended by the MSF or, for that matter, by the State. Indeed, it would have been extraordinary for the Compacts to address that subject, as it is a matter internal to the State and not an issue requiring the agreement of the Tribes. The Appropriations Clause, however, speaks only to payments "out of the state treasury." Const 1963, art 9, § 17 (emphasis added). Since the original Compacts speak only to the payment of funds to the Michigan Strategic Fund, they do not violate the Appropriations Clause.[15]

Additionally, as this Court recognized in its decision in *TOMAC*:

> IGRA only grants the states bargaining power, not regulatory power, over tribal gaming. The Legislature is prohibited from unilaterally imposing its will on the tribes; rather, under IGRA, it must negotiate with the tribes to reach a mutual agreement. As further noted above, the hallmark of legislation is unilateral imposition of legislative will. Such a unilateral imposition of legislative will is completely absent in the Legislature's approval of tribal-state gaming compacts under IGRA. Here, the Legislature's approval of the compacts follows the assent of the parties governed by those compacts. Thus, the Legislature's role here requires mutual assent by the parties – a characteristic that is not only the hallmark of a contractual agreement but is also absolutely foreign to the concept of legislating.
>
> Further, the compacts approved by HCR 115 do not apply to the citizens of the state of Michigan as a whole; they only bind the two parties to the compact. Legislation "'looks to the future and changes existing conditions by making a new rule to be applied

[15] The payment provision in the LTBB Amendment does not violate the Appropriations Clause either. The amended payment provision indicates that LTBB will make payments "to the State." (TOMAC App at 63a). Clearly, an agreement between the State and a Tribe that the Tribe will make payments to the State does not violate the Appropriations Clause. Again, that Clause applies only to payments out of the State Treasury. Const 1963, art 9, § 17. The Amendment does not purport to determine how funds paid to the State by LTBB will be appropriated or spent, and instead leaves this determination to the normal functioning of State government. Accordingly, the payment provision in the Amendment does not, on its face, violate the Appropriations Clause. *TOMAC has conceded this point*, as it does not directly challenge the payment provision of the Amendment in its Brief.

> thereafter to all or some part of those subject to its power.'" Here, the compacts approved by HCR 115 have no application to those subject to legislative power; rather, they only set forth the parameters within which the tribes, as sovereign nations, have agreed to operate their gaming facilities. *TOMAC*, *supra* at 323-324 (citations omitted).

This Court accordingly held that the Compacts fundamentally are contracts between the State and the Tribes. *Id*. Section 17(C) of the Compacts simply sets forth the agreement between the contracting parties as to how the Tribes are to make payments to the State. If the State must do something further in order to appropriate or spend the funds paid by the Tribes to the MSF, that is a matter for internal resolution by the State. The Tribes need not, and in fact cannot, be involved in that process. Their Compacts thus need not be involved in it either. The language in the Compacts directing the Tribes to make payments to the MSF simply cannot constitute an appropriation.

2. ***The Funds Are Not Funds Of The Treasury And Are Not State Funds.***

In addition to the fact that the Compacts do not require payments out of the State Treasury, the Compacts also do not violate the Appropriations Clause because they do not deal with funds that belong to the State Treasury or that are "state funds." Instead, the funds are paid from the Tribes to the MSF.

The MSF was created by the Michigan Strategic Fund Act, 1984 PA 270, MCL 125.2001 to 125.2094 (the "MSF Act" or the "Act"), in order to:

> help diversify the economy of this state, to develop and expand existing and alternative sources of energy and the conservation of energy, to assist business enterprise in obtaining additional sources of financing to aid this state in achieving the goal of long-term economic growth and full employment, to meet the growing competition for business enterprises, to preserve existing jobs, to create new jobs, to reduce the cost of business and production, to foster export activity, to alleviate and prevent unemployment through the retention, promotion, and development of agriculture and agricultural facilities, forestry and forestry facilities,

> commerce and commercial facilities, export markets and export activities, industry and industrial buildings and facilities, including the sites therefor, and agricultural, forestry, commercial, and industrial machinery and equipment, water and air pollution control equipment, and solid waste disposal facilities with respect thereto or for use by individuals for private sector employment, and to otherwise assist in the achievement of the solution to the problems and objectives set forth in section 1 [of the MSF Act]. MCL 125.2002.

Pursuant to the Act, the MSF is a "public body corporate and politic" that functions "independently of the state treasurer." MCL 125.2005(1).[16]

Among other things, the MSF has the power to:

- Sue and be sued, MCL 125.2007(a);
- Solicit and accept gifts, grants, loans, and other aids from any person, MCL 125.2007(b);
- Make grants, loans, and investments, MCL 125.2007(c);
- Borrow money and issue bonds and notes to finance part or all of the project costs of a project, MCL 125.2007(e);
- Invest its money at its discretion, in any obligations determined proper by the MSF, and name and use depositories for its money, MCL 125.2007(h); and
- Do all other things necessary or convenient to achieve the objectives and purposes of the MSF, the MSF Act, or other laws that relate to the purposes and responsibilities of the MSF. MCL 125.2007(s).

This grant of corporate capacity to an entity for the purpose of administering some form of civil government has long been accepted as a proper act of the Legislature. *In Re Advisory Opinion on Constitutionality of Act No 346 of Public Acts of 1966*, 380 Mich 554, 568; 158 NW2d 416 (1968); 22 Mich Civ Jur § 23. Granting the MSF corporate powers creates neither a private nor a municipal corporation—the MSF is not a "political subdivision" of the State.

[16] Prior to the passage of 2005 PA 225, this statutory section indicated that the MSF would be a part of the department of commerce (since renamed the Department of Labor & Economic Growth), and would function independently of that department. The recent statutory change to the department of treasury, however, is irrelevant for purposes of this analysis.

Instead, the MSF acts as an "instrumentality" of the State commonly known as a "quasi corporation." *Id*. As such, the MSF operates to accomplish a public purpose (i.e. economic diversification), and in carrying out its duties serves no personal or private interest. *Id*. at 569. While the MSF thus has a public purpose of diversifying and growing the economy of the State, it is a distinct entity separate and apart from "the State" and its funds are not funds of "the State."

Several public bodies corporate or quasi-corporations exist under Michigan law, including the Michigan State Housing Development Authority ("MSHDA"), MCL 125.1421; the Michigan State Hospital Finance Authority, MCL 331.41; the Michigan Education Trust, MCL 390.1425; and the Michigan Municipal Bond Authority, MCL 141.1054. The State Bar of Michigan also is a public body corporate that is regulated by this Court. MCL 600.901; MCL 600.904. Of these entities, MSHDA has been the subject of the litigation most relevant to the issues presented by this case.

In *In Re Advisory Opinion on Constitutionality of Act No 346 of Public Acts of 1966*, this Court held that the Act creating the Michigan State Housing Development Authority, 1966 PA 346, MCL 125.1401 to MCL 125.1499c, was valid and did not involve an unconstitutional grant of the credit of the State. The Court also found that bonds issued by MSHDA are not obligations of the State and that <u>funds of the state housing development authority are not State funds</u>. *Id*. at 583. In reaching this conclusion, the Court stated:

> Moneys of the state housing development authority are not moneys of the State. The funds to be established under the act are trust funds to be administered by the state housing development authority. The State has no beneficial interest in such funds, and when such funds are used to finance the construction of housing, the State cannot be said to be financially interested in such construction. The state government can neither gain nor lose by reason of such construction. *Id*.

The Court thus found that, although MSHDA serves a public purpose, funds held by MSHDA are not State funds. *See also WA Foote Memorial Hospital Inc v Kelley*, 390 Mich 193, 213; 211 NW2d 649 (1973) (reviewing the Michigan State Hospital Finance Authority Act and noting that a "state authority may borrow money and issue bonds but … these will not be considered debts of the state"). Accordingly, funds held by the MSF, like funds held by other public bodies corporate are not "state funds." While those funds are "public funds" in that they are used for public purposes pursuant to enabling legislation, they do not constitute "state funds," *In re Advisory Opinion*, *supra*, and hence are not subject to appropriation.[17] The Appropriations Clause does not apply to those funds.

As a public body corporate, the MSF is a "discretely presented component unit" within the State. This classification is set forth in the State of Michigan Comprehensive Annual Financial Report ("CAFR").[18] The CAFR is produced by the State pursuant to the Michigan Constitution, Const 1963, art 9, § 23, which provides: "All financial records, accountings, audit reports and other reports of public moneys shall be public records and open to inspection. A statement of all revenues and expenditures of public moneys shall be published and distributed annually, as provided by law." The Department of Management and Budget Act, 1984 PA 431, MCL 18.1101 to 18.1594 (the "DMB Act") sets forth the additional parameters for the CAFR, and provides that "[w]ithin 6 months after the end of the fiscal year, the director shall publish a

[17] While these entities may receive some funding from the State via appropriations, far from all of their funds are received in this manner.

[18] The CAFR is available on the State's website at http://www.michigan.gov/budget/0,1607,7-157-13406_13419---,00.html. Due to the length of the document, copies of only the pages that are relevant to this analysis are included in the Appendix. **(App at 41b-67b).** Intervenors ask that this Court take judicial notice of this document as it constitutes "official government data." *LeRoux v Secretary of State*, 465 Mich 594, 613-14; 640 NW2d 849 (2002). The Michigan Rules of Evidence further permit this Court to take judicial notice of this document in that its "accuracy cannot reasonably be questioned." MRE 201(b).

comprehensive annual financial report which shall conform as nearly as practicable to established governmental reporting standards." MCL 18.1494.

This annual report is broader than a report of those entities and funds subject to the appropriations process. The report includes "all financial records, accountings, audit reports and other reports of public moneys," and includes a "statement of all revenues and expenditures of public moneys." Const 1963, art 9, § 23 (emphasis added). The term "public moneys," however, is distinct from the term "state funds." *Monticello House Inc v County of Calhoun*, 20 Mich App 169, 172; 173 NW2d 759 (1969). Not all public funds are state funds. TOMAC's confusion on this point is a critical flaw in its arguments.[19] As the categorization of the MSF as a "discretely presented component unit" in the CAFR demonstrates, while the MSF may hold public funds, it does not hold state funds.

Within the CAFR, "discretely presented component units" are defined as "legally separate organizations for which the elected officials of the primary government are financially accountable." **(App at 47b).** In addition to the MSF, the following other entities (many of which also are public bodies corporate and politic) also are classified as "discretely presented component units":

- The Land Bank Fast Track Authority, 2003 PA 258, MCL 124.751 to 124.774, which receives tax reverted properties, undertakes expedited action to clear their titles, and then ensures the properties' redevelopment;
- The Michigan Education Trust, 1986 PA 316, MCL 390.1421 to 390.1444, which offers contracts which, for actuarially determined amounts, provide plan participants with future tuition at institutions of higher education;

[19] Furthermore, the out of state cases TOMAC cites in its brief are wholly irrelevant to the issues presented in this case, as the case deals squarely with the intricacies of the structure of the government of the State of Michigan and its component units.

- The Michigan State Housing Development Authority, 1966 PA 346, MCL 125.1401 to 125.1499c, which assists local units by pooling their borrowing activities, and is responsible for assisting local units with their financing of water pollution control projects;

- The Mackinac Bridge Authority, 1950 (Ex Sess) PA 21, MCL 254.301 to 254.302, and 1952 PA 214, MCL 254.311 to 254.332, which accounts for the operation of the Mackinac Bridge;

- The Michigan Exposition and Fairgrounds Authority, 1978 PA 361, MCL 285.161 to 285.176, which conducts an annual state fair and other exhibits and events for the purpose of promoting all phases of the economy of the State;

- The Michigan Higher Education Assistance Authority, 1960 PA 77, MCL 390.951 to 390.961, which is the State guaranty agency under the Stafford Loan Program, the Supplemental Loans to Students Program, and the Parent Loan for Undergraduate Students Program;

- The Michigan Higher Education Student Loan Authority, 1975 PA 222, MCL 390.1151 to 390.1165, which makes loans to students or their parents;

- The Michigan Public Educational Facilities Authority, Executive Reorganization Order 2002-3, which partners with other states to facilitate the acquisition of capital for the construction, rehabilitation, refurbishing, or equipping of qualified public educational facilities;

- The Michigan State Hospital Finance Authority, 1969 PA 38, MCL 331.31 to 331.84, which accounts for the administration of limited obligation debt issued for the benefit of hospitals;

- The Mackinac Island State Park Commission, 1994 PA 451, MCL 324.76701 to 324.76709, which operates the Mackinac Island and Michilimackinac State Parks;

- The Michigan Economic Development Corporation, created by interlocal agreement pursuant to the Urban Cooperation Act of 1967, 1967 (Ex Sess) PA 7, MCL 124.501 to 124.512, which manages programs to stimulate, coordinate, and advance economic development in the State;

- The State Bar of Michigan, 1961 PA 236, MCL 600.901 to 600.949; and

- Ten of the State's public universities, which have boards appointed by the primary government. **(App at 54b-55b).**

As discretely presented component units, each of these entities is authorized *to receive and expend money outside of the normal appropriations process*.[20] Specifically, Section 7 of the MSF Act authorizes the MSF to accept gifts, grants, loans, and other aids from any person, and also to make grants, loans, and investments. MCL 125.2007(b)&(c). The Legislature thus has authorized the MSF, by statute, to receive and expend funds. The MSF does not violate the Appropriations Clause by receiving payments from the Tribes or by using those funds to fulfill its statutory purposes.

Furthermore, definitions of "total state revenues" provided in law provide additional evidence that funds held by the MSF are not state funds. Pursuant to Section 350a of the DMB Act, MCL 18.1350a:

> "Total state revenues" means the combined increases in net current assets of the general fund and special revenue funds, except for component units included within the special revenue group for reporting purposes only. For fiscal years beginning after September 30, 1986, total state revenues shall be computed on the basis of generally accepted accounting principles as defined in this act. However, total state revenues shall not include the following:
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> ***
>
> (iii) Revenues which are not available for normal public functions of the general fund and special revenue funds. (emphasis added).

This section defines those funds that are to be considered in implementing the Headlee Amendment to the Michigan Constitution, Const 1963, art 9, §§ 26-28. Nevertheless, it is instructive that revenues of component units are excluded from the definition of total state

[20] Given the number and nature of these entities, and the history and scope of their use within and apart from various branches of state government, the very rigid and expansive interpretation of the Appropriations Clause and the term "state funds" urged by TOMAC conflicts with a wide array of statutorily authorized activities. If the Court were to adopt TOMAC's radical and novel view, it could have a serious disruptive effect not only on the MSF but also on many other similar public entities; the potential consequences could well be far-reaching and not entirely predictable.

revenues. Similarly, funds held by the MSF are excluded from the definition of state funds, and thus are excluded from the application of the Appropriations Clause. Const 1963, art 9, § 17.

It is telling that in their amicus brief filed with this Court on May 24, 2006, Senate Majority Leader Ken Sikkema and Senator Shirley Johnson, Chair of the Senate Appropriations Committee, agree that the funds paid by the Tribes to the MSF are not subject to appropriation. Instead, the Senators state:

> [T]he original compact required that tribal payments to the State be deposited into the MSF (or successor fund) – *not* the State Treasury – and, therefore, were not subject to the appropriation process. No money can be paid out of the State *Treasury* except in pursuance of appropriations made by law. This distinguishing characteristic is critically important. If money is not paid to the State, it is not deposited into the State Treasury. … [F]unds which pass into the hands of a quasi corporation – rather than to the State Treasury – do not automatically become State funds subject to control by the Legislature. (Amicus Brief of Senators Sikkema and Johnson, at 30-31) (emphasis in original).[21]

Thus, contrary to the position advanced by TOMAC, the two Senators who are most closely involved with the issue of legislative appropriations – the Senate Majority Leader and the Chair of the Senate Appropriations Committee – agree that the Compacts do not work an encroachment upon the Legislature's power and responsibility to appropriate funds out of the State Treasury. This Court should not disturb the arrangement that the Tribes and the State have made, particularly where key persons involved in that arrangement find no infirmity with it.

In crafting the Compacts, the political branches of State government (the Legislature and the Governor) and the Tribes knew what they were doing. The direction of payments to the MSF

[21] To the extent that the Senators' Amicus Brief addresses issues related to the Amendment to the LTBB Compact, those issues will be addressed by LTBB in its Reply Brief under case number 129822. Although the positions of the Senators and LTBB diverge with respect to those issues, it is telling that both take the position that Section 17 of the original Compacts does not violate the Appropriations Clause.

was a carefully reasoned decision that was consistent with the parties' understanding of the Michigan Constitution, the treatment of public funds, and the authority of the elected officials acting on behalf of the State and the Tribes. The Court should defer to this choice.

B. There Is No Violation Of MCL 18.1441(1) Because The MSF Is Authorized By Statute To Receive Funds.

In addition to its arguments based on the Appropriations Clause, TOMAC further argues that Section 17(C)(i) of the Compacts violates MCL 18.1441(1). (TOMAC Brief at 8). This statute, which is part of the DMB Act, provides: "The receipts of the state government, from whatever source derived, shall be deposited pursuant to directives issued by the state treasurer and credited to the proper fund. The director shall issue directives to implement this section relative to the accounting of receipts." MCL 18.144(1).

Section 1.01 TOMAC fails to recognize, however, that, as is demonstrated in Part II.A.2., above, payments to the MSF are not a "receipt of the state government." MCL 18.1441(1). Instead, such payments are payments to the MSF, a public body corporate that is separate from the "government." As the Michigan Strategic Fund Act states, the MSF is "a public body corporate and politic" that functions independently of the state treasurer. MCL 125.2005(1). Further, the Act provides:

> The statutory authority, powers, duties, functions, records, personnel, property, unexpended balances of appropriations, allocations, and other funds of the fund, including the functions of budgeting, procurement, personnel, and management-related functions, shall be retained by the fund… MCL 125.2005(1).

Thus, the statutorily authorized independence of the MSF is clear. Its statutory ability to receive funds – both appropriated funds and funds from other sources – is likewise indisputable.

Section 7(b) of the Michigan Strategic Fund Act, MCL 125.2007(b) specifically authorizes the MSF to "accept gifts, grants, loans, and other aids from any person … or to

participate in any other way in any federal, state, or local government program." The more specific statute for the MSF must control the general statute in the DMB Act. *Gebhardt v O'Rourke*, 444 Mich 535, 542-543, 510 NW2d 900 (1994); *Comben v State of Michigan*, 263 Mich App 474, 484; 688 NW2d 840 (2004); *Carr v Midland Co Concealed Weapons Licensing Board*, 259 Mich App 428, 439; 674 NW2d 709 (2003).

III. TOMAC CANNOT OBTAIN THE RELIEF IT SEEKS, INVALIDATION OF THE ENTIRE COMPACTS, DUE TO FUNDAMENTAL PRINCIPLES OF CONTRACT LAW.

Even if this Court were to find that Section 17(C)(i) of the Compacts violates the Appropriations Clause insofar as it "directs" payments to the MSF, fundamental principles of contract law preclude invalidating the Compacts as a whole.

A. The Court Should Interpret The Compacts In A Manner That Renders Them Valid.

It is a standard principle of contract interpretation that contracts are to be interpreted in a manner that renders them valid and legal. *See Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 497-498; 628 NW2d 491 (2001). In this case, the Compacts do not violate the Appropriations Clause in the first instance. As this Court has previously stated, in interpreting contracts, courts must presume that the parties "want their contract to be valid and enforceable." *Cruz v State Farm Mutual Automobile Ins Co*, 466 Mich 588, 599; 648 NW2d 591 (2002). Accordingly, the Court is "obligated to construe contracts that are potentially in conflict with a statute [or, presumably, with the Constitution], and thus void as against public policy, where reasonably possible, to harmonize them with the statute." *Id*. In this case, the Compacts indicate that the Tribes will make payments "to the MSF, or its successor as determined by State law." (TOMAC App at 21a). The parties clearly intended that those payments would be made and received in a manner consistent with state law. The Court therefore should interpret the

Compacts in such a manner that the payments are made to the MSF pursuant to the requirements of state law.

In fact, it is clear from the language employed by the parties to the Compacts that they anticipated that state law might affect the operation of the payment provision. Section 17(C)(i) of the Compacts states that the Tribes will make payments to the MSF "or its successor as determined by State law." (TOMAC App at 21a). The inclusion of this phrase evidences the parties', and especially the Tribes', intention that the Compacts were intended to and did in fact leave the issue of the ultimate direction of the payments to the State. In other words, the Tribes had no specific intention that the payments required by Section 17(C)(i) of the Compacts would and could only be directed to the MSF. Instead, the Tribes agreed to pay the money to the MSF, or to "its successor as determined by State law." (TOMAC App at 21a). If the Legislature were to abolish the MSF and create a new entity to act in its place and as its successor, then the Tribes would make payments to that entity under the language of Section 17(C)(i). Similarly, if this Court were to find that the MSF cannot accept or expend funds paid to it by the Tribes in the absence of an appropriation, then the parties to the Compact would be bound by that change in state law. The Compacts do not require the Tribes to continue to make payments to the MSF if there is a change in state law that makes such payments impossible or impermissible.

While the parties to the Compacts understood and believed that payments to the MSF did not require an appropriation, if this Court finds some constitutional or statutory infirmity with the direction of tribal payments to the MSF, the Compacts still can remain effective, and the State need only conform its conduct in the handling of the funds to this Court's decision. In fact, this Court would have two options for interpreting the Compacts so as to render them valid. First, if this Court finds that the funds paid by the Tribes must be deposited in the State Treasury, and

cannot be deposited in accounts held by the MSF, this Court need simply find that the MSF must turn the payments over to the State Treasury. Second, if this Court finds that the MSF cannot spend the funds paid to it by the Tribes without an appropriation, then this Court need simply find that the Legislature must pass such an appropriation before the money can be spent. In either case, however, the Court's conclusion would not lead to a finding that the Compacts are invalid. Instead, any holding that the payments to the MSF create a constitutional or statutory problem simply must be honored by the State's political branches prior to the deposit or expenditure of any Compact monies received from the Tribes.

As this Court has previously held, the Compacts represent an agreement between two sovereigns, the State and the Tribes. *TOMAC*, *supra* at 318-319. In the Compacts, the Tribes agreed to make payments to the MSF. (TOMAC App at 21a). The Compacts do not purport to speak to what the MSF can do with that money once the Tribes submit it to the MSF. Such matters need not be addressed in the agreement between the State and the Tribes. That they are not addressed in the Compacts does not render Section 17(C)(i) of the Compacts invalid.

B. If This Court Were To Find That The Language Directing Tribal Payments To The MSF Violates The Appropriations Clause, It Can And Should Sever The Phrase "To The Michigan Strategic Fund, Or Its Successor As Determined By State Law" From The Compacts, And Permit The Remaining Language To Stand.

As has been demonstrated above, Section 17(C)(i) of the Compacts does not violate the Appropriations Clause, Const 1963, art 9, § 17, because the payments required by that Section do not constitute payments out of the State Treasury, and do not constitute state funds. Further, to the extent that this Court finds either that the funds must be directed to the State Treasury once received or that the Legislature must appropriate the funds that the Tribes pay to the MSF before those funds can be spent, then this process can occur outside of the Compacts, and should do nothing to affect the validity of the Compacts.

If this Court were to find, however, that the language of the Compacts directing the Tribes to make payments to the MSF somehow in itself violates the Appropriations Clause, then this Court should sever the offending phrase from the Compacts, thus revising Section 17(C)(i) of the Compacts as follows:

> Payment ~~to the Michigan Strategic Fund, or its successor as determined by State law,~~ in an amount equal to eight percent (8%) of the net win at the casino derived from all Class III electronic games of chance, as those games are defined in this Compact.

This revision then would cause the parties to refer back to the remaining language of Section 17(C) of the Compacts to determine how payments would be made. This language states:

> From and after the effective date of this Compact (as determined pursuant to Section 11 of this Compact), and so long as the conditions set forth in subsection (B) [regarding limited exclusivity of gaming operations] remain in effect, the Tribe will make semi-annual payments **to the State** as follows: (TOMAC App at 21a) (emphasis added).

If the Compact were revised in this way to sever the direction of payments to the MSF, the Tribes and the State then could continue to enjoy the benefits of their bargain, and only the manner of the State's receipt of the payments would be affected.

In its Brief, TOMAC states in conclusory fashion that the language of Section 12(E) of the Compacts renders the direction of the payments to the MSF non-severable. (TOMAC Brief at 11-12). That language states:

> In the event that any section or provision of this Compact is disapproved by the Secretary of the Interior of the United States or is held invalid by any court of competent jurisdiction, it is the intent of the parties that the remaining sections or provisions of this Compact, and any amendments thereto, shall continue in full force and effect. This severability provision does not apply to Sections 17 and 18 of this Compact. (TOMAC App at 18a).

TOMAC baldly asserts that the last sentence of this provision means that if this Court finds that the direction of payments to the MSF in Section 17(C)(i) violates the Appropriations Clause, the

entire Compacts must fall because Sections 17 and 18 are entirely non-severable. That argument is incorrect, however, for two reasons.

First, contrary to TOMAC's suggestion, this Court need not sever all of Section 17 in order to render the Compacts valid. TOMAC's entire quarrel with the language of Section 17 is with the specific direction of payments to the MSF. TOMAC has not demonstrated and cannot demonstrate that any other provision in Section 17 violates the Appropriations Clause, or any other clause of the Michigan Constitution. If indeed this Court were to find that the direction of payments "to the Michigan Strategic Fund or its successor as determined by State law" violates the Appropriations Clause (which it does not), then it only need strike those words in order to render the provision valid.

Second, TOMAC reads far too much into the last sentence of Section 12(E) of the Compacts. Section 12(E) states that if a section of the Compact is found to be invalid, the remaining sections should continue in full force and effect. In other words, it provides for automatic severability, obviating the need for the usual common law severability analysis that attempts to discern the parties' intent with respect to an offending provision. The last sentence of Section 12(E) indicates that the automatic severability clause "does not apply to Sections 17 and 18 of this Compact." (TOMAC App at 18a). However, this sentence does not, as TOMAC assumes without analysis, state that Sections 17 and 18, including their discrete components, are entirely non-severable. Instead, Section 12(E) leaves that analysis to the courts, which under long-accepted principles must look to the intent of the parties to determine whether the offending provision should be severed.[22]

[22] In a letter dated January 29, 1997, then-Governor Engler indicated that this provision was intended to make it "explicit that the Secretary of Interior cannot approve the compact if he determines that the payments to the state or local jurisdictions are invalid for any reason." Letter from Governor Engler to Senator Posthumus and Representative Hertel (January 29, 1997).

It is a general rule of contract law that a void provision should be severed if it is not an essential part of the whole. *Peeples v City of Detroit*, 99 Mich App 285, 296; 297 NW2d 839 (1980) (referring to Restatement Contracts § 607); *see also Robertson v Swindell-Dressler Co*, 82 Mich App 382, 400; 267 NW2d 131 (1978). The primary consideration in determining whether a contractual provision is severable is the intent of the parties. *Professional Rehabilitation Associates v State Farm Mut Auto Ins Co*, 228 Mich App 167, 174; 577 NW2d 909 (1998). Here, the parties intended that payments be made "to the State." Compacts, Section 17(C). (TOMAC App at 21a). The Compacts then direct that funds be paid directly to the MSF. *Id*. The parties clearly did not intend that the entire Compacts would fail if the Court determines that the payments cannot be directed to the MSF without an appropriation. In that event, the Tribes can simply make their payments to the State, and the State can then determine the proper method for directing those funds to the MSF. The Court should not take the extraordinary step of invalidating the entire Compacts where there is no evidence that this would reflect the intention of the parties.

All of the parties to the Compacts (the State and each of the four compacting Tribes) are indicating to this Court in briefs filed with it today that it was not their intent that if the MSF clause of Section 17(C)(i) should fail, the entire Compacts would fail with it. TOMAC, a non-

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(App at 17b-18b). While this letter is dated in early 1997, the Compacts did not change in any relevant respect between that date and the date of their execution in 1998. The language of Governor Engler's letter clearly demonstrates that it was the parties' intent that the <u>whole</u> of Section 17 or 18 should not be severed from the Compacts – i.e. that the State did not intend for the Tribes to enjoy the benefits of gaming exclusivity while not having to make payments to the State, and that it intended that the Tribes also should be required to make revenue payments to the local units of government in which their gaming facilities were located. This limit on severability would protect the interests of the State and local units of government. To apply the limit so as to invalidate the entire Compacts, however, would utterly confound the intent of the parties.

party to the Compacts, has provided the Court with nothing that would indicate otherwise. It would be extraordinary for the Court to invalidate the Compacts under these circumstances.

Although TOMAC cites this Court's decision in *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 537; 473 NW2d 652 (1991), as support for the assertion that if the terms of a contract are non-severable, and a part of the contract is invalid, the entire contract is unenforceable, (TOMAC Brief at 12), TOMAC fails to recognize that the initial analysis of whether the terms of a contract are severable turns on whether the contract, "in its nature and purpose, … is susceptible of division and apportionment." *Id*. In this case, it is clear that the parties did not intend that the entire Compacts would fail because of one short phrase directing the payments to the MSF. Instead, if this Court finds that portion of Section 17(C)(i) of the Compacts to be invalid, this Court should sever that phrase from the Compacts, and leave the remaining provisions intact.

CONCLUSION AND RELIEF REQUESTED

This Court's decision in *TOMAC* does not lead to the result TOMAC here suggests. The Compacts do not violate the Appropriations Clause of the Michigan Constitution, Const 1963, art 9, § 17, nor do they violate MCL 18.1441. The Compacts are valid and enforceable, and must stand. Furthermore, even if this Court were to find that the payment provision of the Compacts is unconstitutional or violates the statute (which it does not), this Court should exercise its power either to interpret the Compacts in a manner that renders them constitutional or to sever that portion of the Compacts which it finds to be invalid, so that the parties to the Compacts may honor the agreements they made and have lived by for almost eight years. This Court should affirm its decision in *TOMAC* that the Compacts are valid contracts, and also should affirm the Court of Appeals' order finding that TOMAC's arguments based on the Appropriations Clause

are procedurally inappropriate. Alternatively, this Court should conclude that TOMAC lacks standing to pursue those arguments or that they are substantively invalid.

Respectfully submitted,

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